be reversed or set aside unless it is shown to the satisfaction of the court of a judge that such judgment, sentence or order was either wrong in law or against the weight of the evidence", my duty is clear. The appeal against conviction is dismissed.

As to the sentence I held the view that it is impossible not to take into account the circumstances under which an offence came to be committed. The moral obliquity, in this case, is nothing like on a par with an abuse by a public officer of his post to extort bribes. There are varying degrees of culpability in offences under the Act. Here the appellant had been deliberately sought out and whatever resistance he ought to have had was eroded by the persistent attention of Ramadass. The result of the appellant's conviction will gravely affect his future, apart from the loss of his post and pension. Taking all relevant facts into consideration I think that justice will be served by setting aside the sentence of imprisonment, and in lieu thereof I fine him the sum of $5,000, in default 12 months imprisonment. The order of the president under section 13 of the Act is affirmed.

Appeal dismissed. Sentence of imprisonment set aside. Fine imposed.

Solicitors: *Singh & Co.*

HARI SINGH v. SUNDARAMMAL

[O.C.J. (MacIntyre J.) May 31, 1965]

[Ipoh — Civil Suit No. 526 of 1964]

Practice and Procedure — Attachment before judgment — Application to set aside ex-parte order — Affidavit containing statements based on knowledge, information and belief — Hearing of motion to set aside ex-parte order made in chambers — Fresh evidence — R.S.C. 1957, O. 38 r. 3 — Debtors Ordinance, 1957, s. 20.

The defendant applied for an order to set aside an *ex-parte* order of attachment before judgment of the defendant's land. The affidavit in support of the application for the order of attachment was made by the plaintiff who deposed "to the best of my knowledge, information and belief".

Held: (1) in an *ex-parte* application for an order of attachment the person making the application must show that he has a good cause of action and he must show the utmost good faith by not holding back vital information touching upon matters pertinent to the application;

(2) in this case the plaintiff had failed to disclose the fact that the money was borrowed and the acknowledgment signed not by the defendant herself but by her agent, and therefore the *ex-parte* order must be discharged;

(3) when knowledge and information and belief are alleged at the same time in an affidavit it is necessary for the defendant to state how much of the allegation is based on personal knowledge and how much on information and belief;

(4) fresh evidence cannot be introduced at the hearing of a motion to set aside an *ex parte* order made in chambers.

Cases referred to:—

(1) *In re J. L. Young Manufacturing Co. Ltd.* [1900] 2 Ch. 753, 754 and 755.

(2) *Cartwith Ltd.* v. *J. E. Lloyd & Ors.* [1965] 1 M.L.J. 140.

(3) *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (1881-2) 20 Ch.D. 501, 508.

(4) *Madan Theatres Ltd.* v. *Hari Das* A.I.R. 1936 Lahore 33, 34.

(5) *Munns* v. *Longden* 32 W.R. 675.

APPLICATION TO SET ASIDE *EX PARTE* ORDER.

K. C. Vohrah for the plaintiff.

P. P. Dharmananda for the defendant.

MacIntyre J.: In this application, Mr. Dharmananda for the defendant moves the court by notice of motion to set aside an *ex-parte* order of attachment before judgment of the defendant's land made by me in chambers on the 14th of December 1964 under section 19 of the Debtor's Ordinance, 1957. The application is made under section 20 of the said Ordinance.

One of the statutory requirements of which the court must be satisfied before making an order of attachment before judgment is that the plaintiff has a good cause of action. It is also settled law that on an *ex-parte* application, the person making the application should show the utmost good faith by not holding back any vital information touching upon matters pertinent to the application.

In his statement of claim endorsed on the writ, the plaintiff claims a sum of $8,507.54 of which the sum of $8,000 is alleged to be a loan given to M. Sundarammal (f), the defendant, on the 31st of July 1964 and the sum of $507.54 is said to be interest at 18% per annum from 31st July to 4th December 1964 due and owing by virtue of a consent in writing signed by the defendant herself on the 31st of July 1964.

In his affidavit dated the 7th of December 1964 and filed in support of the application for an attachment before judgment, the plaintiff says, *inter alia*, that the defendant had come to Malaya on a visit pass and that to the best of his knowledge, information and belief she was making arrangements to leave the country for good on the 17th of December 1964. He further says: "to the best of my knowledge, information and belief the defendant is negotiating the sale of her interests on this said two pieces of land."

Now, the facts alleged in the affidavit read in conjunction with the statement of claim is calculated to create the impression that the defendant arrived in this country on a short visit, borrowed the sum of $8,000 from the plaintiff and was about to leave the country for good after disposing her interests in her two pieces of land.

It now transpires from the affidavit of the defendant dated the 27th of April 1965 that she was not in this country when the alleged loan was made, she signed no document acknowledging the loan or agreeing to pay interest on the loan and the money was borrowed by her attorney, one Karuppiah, without her knowledge and consent on a power of attorney which did not authorise him to borrow money in the manner set out in the statement of claim. Had the fact that the money was borrowed by an attorney been made known in the affidavit of the plaintiff, it would have immediately put me on the alert as to the soundness of the cause of action and I would have called for the production of the power of attorney to satisfy myself whether the plaintiff had a good cause of action or not. The failure to mention that fact when the application for an *ex-parte* order was made is alone sufficient reason for me to discharge the order.

However, the point made by Mr. Dharmananda is that the order was made on insufficient or no evidence at all, as the facts deposed to in the affidavit of the plaintiff are made on information and belief without disclosing the source of the information as required under rule 3 of Order 38 of the Rules of the Supreme Court.

In the case of *In re J.L. Young Manufacturing Co. Ltd.*,[1] on an appeal from an order refusing an applicant's claim to rank as a debenture holder based on evidence which consisted mainly of affidavits containing statements on "information and belief", Lord Alverstone C.J. said:

> "In my opinion some of the affidavits in this case are wholly worthless and not to be relied upon. I notice that in several instances the deponents make statements on their 'information and belief,' without saying what the source of information and belief is, and in many respects what they so state is not confirmed in any way. In my opinion so-called evidence on 'information and belief' ought not to be looked at all, not only unless the court can ascertain the source of the information and belief, but also unless the deponent's statement is corroborated by some one who speaks from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received as evidence in any shape whatever; and as soon as affidavits are drawn so as to avoid matters that are not evidence, the better it will be for the administration of justice."

Supporting this judgment Rigby L.J. said:

> "I never pay the slightest attention myself to affidavits of that kind, whether they be used on interlocutory applications or on final ones, because the rule is perfectly general — that, when a deponent makes a statement on his information and belief, he must state the ground of that information and belief."

Vaughan Williams L.J. even went further and observed:

> "With regard to affidavits of the sort before us, it is not quite a sufficient or satisfactory remedy to throw upon the party upon whose behalf such affidavits are put forward the liability of paying the costs of those affidavits."

The judgment in the case of *In re J.L. Young Manufacturing Co. Ltd., supra,* was followed in the Singapore case of *Cartwith Ltd.* v. *J.E. Lloyd & Ors.*[2]

In the instant case, however, the plaintiff went one step further and deposed to facts "to the best of my knowledge, information and belief." Mr. Vohrah for the plaintiff submitted that the words, "to the best of my knowledge" would indicate that the plaintiff was personally aware of the facts apart from the facts being confirmed by information and belief.

It would appear that the proper interpretation to be placed on the words, "to the best of my knowledge, information and belief" is that the knowledge was based on information and belief. In the case of *Quartz Hill Consolidated Gold Mining Company* v. *Beall* [3] Jessel M.R. in allowing an appeal from an order on an interlocutory injunction in a libel action said:

> "Now, in this instance, the only witness for the plaintiffs is their secretary, who says not that the circular is untrue, but that the statements in the circular are to the best of his knowledge, information, and belief are untrue. He does not shew that he has any knowledge at all on the subject of these statements. He probably as secretary has some knowledge about them, but he does not shew it; and where an affidavit is made upon information and belief the rules of the court require that the deponent should state what are the grounds of his information and belief, and that he does not do, he only says that they are untrue to the best of his knowledge, information, and belief, not saying what the best of his knowledge is, and it may be nothing at all. There is, therefore, no evidence as to the untruth of the allegations in the circular."

In the case of *Madan Theatres Ltd.* v. *Hari Das*,[4] in setting aside an order of attachment before judgment, the appeal court held that

> "the affirmation attached to the affidavit is wholly insufficient. It does not give any details as to what portion of the affidavit was based upon the personal knowledge of the deponent and what allegations were founded upon information and whether he believed it to be true."

It would therefore appear when knowledge and information and belief are alleged at the same time, it is necessary for the deponent to state how much of the allegation is based on personal knowledge and how much on information and belief.

The plaintiff has also filed an affidavit dated 29th April 1965 in reply to the defendant's affidavit aforesaid. He has not thought fit to deny any of the allegations made by the defendant but says that he derived the information that the defendant's visit pass would expire in December 1964 from her attorney Karuppiah. Again at his instance, one A. Khader has also filed an affidavit dated 29th April 1965 alleging that one Arunasalam Pillai had asked him in the presence of the defendant to find a purchaser for her lands which she wanted to sell.

I am satisfied on the authority of the decision in *Munns* v. *Longden*,[5] that fresh evidence cannot be introduced at the hearing of a motion to set aside an *ex-parte* order made in chambers.

For the reasons stated above, I hold that the defendant has shown reasonable cause why the seizure of the immovable property of the defendant by attachment before judgment should be set aside and I order accordingly with costs to the defendant.

Order granted.

Solicitors: *Arulanandom & Co.; P. P. Dharmananda.*

HII CHING CHAI v. HII TAI TUONG

[A.C.J. (Lee Hun Hoe J.) June 3, 1965]
[Sibu — Civil Revision No. 2 of 1965]

Practice and Procedure — Trial — Hearing before different magistrates — Whether magistrate has power to continue civil case part heard by another magistrate.

In this case the case was originally heard by a magistrate who heard one witness and adjourned the hearing. Subsequently a second magistrate continued the hearing and heard three witnesses and then adjourned the hearing. A third magistrate then took over, heard a witness for the defendant and gave judgment for the plaintiff.

Held: there is nothing in the Subordinate Courts Ordinance or rules made thereunder to permit a succeeding magistrate to continue hearing of civil cases on evidence taken and recorded by his predecessor. The judgment must be set aside and a new trial ordered.

Case referred to:—

(1) *Chua Chee Chor* v. *Chua Kim Yong* [1960] M.L.J. 127 and [1963] M.L.J. 17 P.C.

CIVIL REVISION.

Lee Hun Hoe J.: This is a revision under section 11 of the Subordinate Courts Ordinance and section 33 of the Courts of Judicature Act, 1964. This case has an unfortunate history. Three magistrates had each dealt with part of the case. On 9th December, 1964 one magistrate heard a witness and adjourned the hearing when plaintiff informed him that his witness was sick. On 25th January, 1965 a second magistrate continued with the hearing and heard three witnesses and adjourned the hearing further to enable the defendant to call his son as a witness. On 15th April, 1965 a third magistrate took over and heard the defendant's son and gave judgment for plaintiff with costs.

Needless to say such practice is highly irregular and undesirable. Under section 206 of the Criminal Procedure Code where a change of magistrate occurs in a trial or inquiry the succeeding magistrate may act on the evidence recorded by his predecessor or he may hear the case *de novo*. The relevant section reads:—

"206. Whenever any magistrate after having heard and recorded the whole or any part of the evidence in an inquiry or a trial ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:

Provided that—

(a) in any trial the accused may, when the second magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and heard; and

(b) the High Court may, whether there be an appeal or not, set aside any conviction and or commitment made on evidence not wholly recorded by the magistrate before whom the conviction was had or the commitment made, if such court is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial."

It is clear that the provisions apply to criminal cases only. No similar provisions could be found anywhere in our law to enable a succeeding magistrate to act on the evidence recorded by his predecessor in civil cases.

In *Chua Chee Chor* v. *Chua Kim Yong* [1] the Judicial Committee of the Privy Council pointed out the grave doubts of Thomson C.J. (as he then was) as to the regularity of the unusual course taken by the judge in acceding to the wishes of the parties that he "should give judgment on evidence as recorded by his predecessor." Although it was held that the evidence had been "taken and recorded" by the judge within the meaning of section 75 of the Trengganu Civil Procedure Code, which applied alike to civil and criminal cases, and, further the hearing was being "continued" before the judge, the course adopted was considered undesirable and a precedent not to be followed. Several cases were referred to their Lordships both in the Privy Council and in the Court of Appeal. I do not think I need mention these cases here.

There is nothing in the Subordinate Courts Ordinance or rules made thereunder to permit a succeeding magistrate to continue hearing of civil cases on evidence taken and recorded by his predecessor. In this case the magistrate had no power to continue hearing a part heard civil case. Unless and until steps are taken to amend the law relating to civil matters magistrates have no alternative but to hear such cases *de novo*.

Accordingly I set aside the judgment and order a new trial to be heard before another magistrate.

New trial ordered.